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No. 88-1094

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

LOIS W. POINIER, TRANSFEREE OF HELEN W. HALBACH, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Helen W. Halbach's disclaimer of her remainder interest in a testamentary trust was a "transfer" to her children within the meaning of Sections 2501(a) and 2511 of the Internal Revenue Code and hence subject to the federal gift tax.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C16) is reported at 858 F.2d 917. The opinion of the Tax Court (Pet. App. D1-D16) is reported at 86 T.C. 478.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1988. The petition for a writ of certiorari was filed on December 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Parker Page, the father of Helen Wodell Halbach (decedent), died testate on January 22, 1937. His will established a trust, the income of which was payable to his

wife, Nellie Page, for life, with the remainder to pass in equal shares to his two daughters. The will further provided that, if either of the daughters had already died by the time of Nellie Page's death, the remainder interest would go to persons appointed by her or, in the absence of such appointment, to the daughter's descendants in equal shares per stirpes. Pet. App. C3-C4.

Nellie Page died on April 14, 1970, at the age of 100. She was survived by her two daughters—decedent, then aged 79, and Lois Page Cottrell, then aged 74, and by decedent's two surviving children, Lois W. Poinier and W. Page Wodell, who are petitioners here. The testamentary trust terminated upon the death of Nellie Page, and decedent and Lois Page Cottrell each became entitled to possession of half of the remainder of the trust corpus under the terms of Parker Page's will. On April 19, 1970, decedent executed a disclaimer renouncing all of her rights in the residual trust created by her father's will. As a result of this disclaimer, decedent's children, petitioners Poinier and Wodell, each became entitled to receive half of the assets comprising decedent's remainder interest in the trust. As of April 19, 1970, the decedent's remainder interest had a fair market value of more than $10 million. An action was filed in the New Jersey Superior Court to determine the validity of decedent's disclaimer (and that of her sister who had executed a similar document on April 30, 1970). That court held that the disclaimers were valid and effective under New Jersey law and directed distribution of the remainder interests disclaimed by the decedent and her sister to their respective children. Pet. App. C4-C5.

2. On April 14, 1971, decedent timely filed a federal gift tax return for the calendar year 1970. On this return, decedent did not include the value of the disclaimed remainder interest as a taxable gift to her children. Pet.

App. D5. Decedent died on August 5, 1972. On audit, the Commissioner determined that the disclaimer was an indirect transfer of property by gift within the meaning of Sections 2501 and 2511 of the Internal Revenue Code.[1] The Commissioner further determined that this gift was not exempt from the gift tax under Section 25.2511-1(c) of the Treasury Regulations on Gift Tax (26 C.F.R. (1970)), because it was not made by the decedent "within a reasonable time after [her] knowledge" of her father's creation of the remainder interest in the trust. Accordingly, the Commissioner asserted a gift tax deficiency of $4,881,387, plus interest, against the decedent for 1970. Notices of liability were sent by the Commissioner to petitioners Poinier and Wodell, in which the Commissioner informed them of the decedent's gift tax liability and of their consequent liability as donee-transferees since the gift tax liability had not been discharged by the decedent. Pet. App. C5-C6.

3. Petitioners sought redetermination of the deficiencies in the Tax Court, which ruled for the Commissioner (Pet. App. D1-D15). The court held that the decedent had not disclaimed her interest in the remainder "within a reasonable time after knowledge of the existence of the transfer," which would have negated treatment as a gift under Treas. Reg. § 25.2511-1(c) (Pet. App. D6-D8). The court explained that, under *Jewett* v. *Commissioner,* 455 U.S. 305 (1982), this "reasonable time" is "to be measured from the time a remainder interest is created and not from the time it becomes possessory" (Pet. App. D7). The court rejected petitioners' argument that *Jewett* should be disregarded because this Court likely would have reached a different result there had it been aware of a particular 1966 private letter ruling. The Tax Court characterized this

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

argument as "grasping at straws" and stated that "even if the Supreme Court had been aware of this private ruling to another taxpayer, it would not have been persuaded to reach a different conclusion in *Jewett*" (*id.* at D8). Since the decedent disclaimed her remainder interest approximately 33 years after that interest was created, the court concluded that her disclaimer constituted a taxable gift. The Tax Court further held that petitioners Poinier and Wodell were liable as donee-transferees of the trust assets for the deficiencies in gift tax due from decedent's estate for the calendar year 1970 (*id.* at D8-D10).

4. The court of appeals affirmed these rulings (Pet. App. C1-C8).[2] The court held that the case was controlled by this Court's decision in *Jewett* v. *Commissioner, supra,* which compelled the conclusion that the disclaimer by the decedent constituted a transfer to her children subject to the gift tax (Pet. App. C6-C7). The court also held that petitioners Poinier and Wodell were liable for the gift tax as donee-transferees under Section 6324(b) of the Internal Revenue Code of 1954, stating that, "[s]ince a gift tax was due and unpaid, the donees are liable for its payment" (Pet. App. C8).

ARGUMENT

Petitioners do not dispute that their argument against the imposition of gift tax liability for the disclaimer by decedent is foreclosed by *Jewett* v. *Commissioner,* 455 U.S. 305 (1982). Rather, they argue that the Court should grant certiorari in order to overrule *Jewett.* Petitioners

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[2] The Tax Court had also held that petitioners were liable for certain additional interest on their deficiencies (Pet. App. D10-D13). The court of appeals reversed this holding, with one judge dissenting (*id.* at C8-C15). The government has not sought further review of that issue, and no question regarding interest is presented by this petition.

maintain that *Jewett* is premised on an "erroneous representation" by the government made at oral argument in that case and accordingly should be reconsidered. This contention is without merit. The government made no misrepresentation to the Court, and *Jewett* was correctly decided. Accordingly, there is no reason for review by this Court. Moreover, the question presented by this case is of diminished future importance because it has no application to transfers made after 1976.

1. The statutory language of the federal gift tax is broad and reaches any gratuitous transfer of any interest in property. Section 2501(a) of the Code imposes a gift tax on any "transfer of property by gift" made by an individual during the taxable quarter. Section 2511(a) of the Code provides that "the tax imposed by section 2501 shall apply where the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." See also I.R.C. § 2512(b). In the words of this Court, "[t]he language of these statutes is clear and admits of but one reasonable interpretation: transfers of property by gift, by whatever means effected, are subject to the federal gift tax." *Dickman* v. *Commissioner,* 465 U.S. 330, 334 (1984). See also *Commissioner* v. *Wemyss,* 324 U.S. 303, 306 (1945).

This case deals with a particular type of device for accomplishing a transfer of property, known as a disclaimer. A disclaimer is a refusal to accept the benefits of property or rights to property, whether given by inter-vivos gift, testamentary transfer, or intestacy. See *Jewett* v. *Commissioner,* 455 U.S. at 306. A disclaimer enables a transferee to accomplish a gratuitous transfer by indirectly causing property to pass to the next qualified person designated in a governing instrument, such as a will or trust. Thus, all disclaimers arguably fall within the broad definition of a taxable gift.

For the taxable year at issue here, however, the Treasury Regulations provided a narrow exception from the gift tax for a limited class of disclaimers. Section 25.2511-1(c) of the Treasury Regulations (26 C.F.R. (1970)) sets forth the circumstances under which tax-free treatment is available in the following terms:

> The gift tax also applies to gifts indirectly made. * * * Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. * * * In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * *

The regulations thus provide that a disclaimer will not constitute a gift if at least two conditions are met: first, the disclaimer must be unequivocal and effective under local law; second, it must be made "within a reasonable time after knowledge of the existence of the transfer."

This Court's decision in *Jewett* v. *Commissioner, supra,* unequivocally holds that the time of the "transfer" referred to in the regulation is the time of the creation of the property interest in question, not the time at which that in-

terest vests or becomes possessory. In this case, the disclaimer was made 33 years after the decedent's remainder interest was created by Parker Page's will. Thus, petitioners acknowledge that both courts below were correct in holding that, under *Jewett,* the disclaimer was not made "within a reasonable time after knowledge of the existence of the transfer" and hence must be subject to gift tax. Petitioners' argument rests entirely on the proposition that *Jewett* should be overruled.

2. Petitioners urge (Pet. 6-16) that *Jewett* should be abandoned because "[t]his Court relied on [an] erroneous representation" (Pet. 6) by the government that led it to reach the wrong result. Specifically, petitioners claim that the government stated at oral argument that the Commissioner had not changed his mind in interpreting the relevant Treasury Regulation (see Pet. 9-10), leading the Court to state in its opinion that the "Commissioner's interpretation of the Regulation has been consistent over the years and is entitled to respect." 455 U.S. at 318. Petitioners assert that this statement by the Court is erroneous because a 1966 private letter ruling stated that a particular disclaimer, which was made many years after the date of a will, would not be taxable as a gift. Petitioners further maintain that *Jewett* would have been decided differently had the Court been aware of the private letter ruling. Accordingly, petitioners contend that *Jewett* should be overruled. This contention is mistaken on several grounds.

First, the government made no misrepresentation in *Jewett,* even if petitioners were correct that the private letter ruling they cite is at odds with the interpretation of the regulation advanced by the government there. Government counsel simply stated that all of the litigated cases reflected a consistent interpretation by the government that the Commissioner had never changed his view that the timing requirement of the regulation hinges on when the

interest was created, not when it vested.[3] Counsel did not purport to guarantee that there had never been any private letter rulings, which are not to be cited as precedent (I.R.C. § 6110(j)(3)), that could be said to deviate from the Commissioner's official position.

Second, the ruling cited by petitioners, Private Letter Ruling 6612201590A (issued Dec. 20, 1966) (reprinted at Pet. App. B1-B5), is fully consistent with the Commissioner's position and with this Court's decision in *Jewett*. That ruling plainly did not construe the term "transfer" to refer to the vesting of an interest. The ruling merely held that, on the particular facts presented there, a disclaimer made in September 1966 of trust interests created in 1935 met the regulation's timeliness requirement because the disclaimant's interest did not arise until a state court decision (holding that adopted children could not succeed to the interests) became final in June 1966. See Pet. App. B2, B4; *Estate of Bunn* v. *United States,* 3 Cl. Ct. 547, 550 (1983).

In any event, there is no merit to petitioners' suggestion that *Jewett* would or should have been decided differently if the Court had been aware of the 1966 private letter ruling and had regarded it as inconsistent with the Commissioner's interpretation of the regulation. This Court's decision did not hinge on deference to a consistent interpretation of the controlling Treasury Regulation. Rather, in the first instance, this Court reached its conclusion that

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[3] This statement was clearly correct. See *Cottrell* v. *Commissioner,* 72 T.C. 489 (1979), rev'd, 628 F.2d 1127 (8th Cir. 1980); *Estate of Halbach* v. *Commissioner,* 71 T.C. 141, 146 (1978); *Keinath* v. *Commissioner,* 58 T.C. 352, 358-359 (1972), rev'd, 480 F.2d 57 (8th Cir. 1973); *Fuller* v. *Commissioner,* 37 T.C. 147 (1961). Indeed, one court has observed that the taxpayer's counsel in *Jewett* agreed that the Commissioner's interpretation of the regulation had been consistent. See *Estate of Bunn* v. *United States,* 3 Cl. Ct. 547, 549-550 (1983).

the disclaimer constituted a taxable transfer based on the broad statutory language of Sections 2501(a) and 2511(a) of the Internal Revenue Code, which impose a tax "on the transfer of property by gift," "whether the gift is direct or indirect." 455 U.S. at 310. The Court further found that the language and history of the controlling Treasury Regulation indicated that the timing requirement of the regulation was triggered by the creation, not the vesting, of an interest. *Id.* at 311-315. Only at the end of its opinion did the Court briefly advert to the Commissioner's consistent interpretation of the regulation (*id.* at 318). The contention that *Jewett* should be regarded as wrongly decided if there had been some administrative deviation from the Commissioner's interpretation of the regulation is simply "not reasonable" (*Estate of Bunn* v. *United States,* 3 Cl. Ct. at 549).[4]

3. Moreover, the issue presented in the petition is of diminishing future importance because it has been definitively resolved by Congress for transfers occurring after 1976. Section 2518 of the Code, enacted in 1976, provides

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[4] The Claims Court in *Estate of Bunn* rejected the same contention made here by petitioners—namely, that *Jewett* should not be followed because the IRS had issued private letter rulings permitting disclaimers to escape gift tax that assertedly were inconsistent with the Commissioner's interpretation. The Claims Court found that these rulings were fully consistent with the Commissioner's position but added that, in any event, such an inconsistency would not undermine the holding of *Jewett* (3 Cl. Ct. at 549):

> [T]he notion that the *Jewett* decision turned entirely upon the Supreme Court's acceptance of a finding that the Commissioner's interpretation of the Treasury Regulation had been followed consistently by him over the years and, that, absent such a finding, the decision would have gone the other way is not reasonable. The Supreme Court's statement on the subject is only the last of ten reasons which the court gave for its decision and occupies only seven lines in a 13 page opinion.

that a disclaimer will not be treated as a taxable gift if, *inter alia,* it is made within nine months after the later of the date on which the transfer creating the interest in the disclaimant is made, or the day on which the disclaimant attains age 21. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b)(1), 90 Stat. 1893. This provision is effective "with respect to transfers creating an interest in the person disclaiming made after December 31, 1976." § 2009(e)(2), 90 Stat. 1896. Thus, the outcome of this case will have no effect on transfers occurring after 1976, and the treatment of pre-1976 transfers, which is currently well settled under *Jewett,* does not warrant this Court's further attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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